United States Court of Appeals

for the Second Circuit

INTERVENOR'S BRIEF

76-4278

ORIGINAL

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CIVIL ACTION NO. 76-4278

REA EXPRESS, INC., BANKRUPT,
C. ORVIS SOWERWINE, TRUSTEE IN BANKRUPTCY,

Petitioners, et al.,

vs.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,

Respondents, et al.

ON PETITION FOR REVIEW OF ORDER
OF INTERSTATE COMMERCE COMMISSION

BRIEF OF INTERVENOR, ALLTRANS EXPRESS U.S.A., INC., IN SUPPORT OF PETITIONER

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STATEMENT OF ISSUES

Are the Commission's orders, served November 19, 1976 and January 28, 1977, arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, insofar as they pertain to:

(1) Dismissal of the application in Docket No. MC-66562 (Sub-No. 2345, Part No. 181);

(2) Cancellation of authority granted in Docket No. MC-66562 (Sub-No. 2308TA);

(3) Failure to find issues raised in the case under review moot by proper application of its own administrative procedures and its governing statute.

STATEMENT OF THE CASE

By complaints filed before the Interstate Commerce Commission on November 25, 1975, November 26, 1975, December 5, 1975, and December 11, 1975, respectively, Brada Miller Freight System, Inc., Schneider Transport, Inc., American Trucking Associations, Inc., and Associated Truck Lines, Inc., et al., sought a cease-and-desist order against alleged unlawful operations of REA Express, Inc. By petition filed December 1, 1975, American Trucking Associations, Inc. sought dismissal of the application designated as MC-66562 (Sub-No. 2314) 1/ filed by REA Express, Inc., Petitioner here, with the Interstate Commerce Commission (Commission),

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1/ In January, 1976, the Commission, sua sponte, consolidated the Sub-No. 2314 application with 192 other REA applications, gave it a new Sub Number (Sub-No. 2345, Part No. 181), and continued the Sub-No. 2308TA in force under 5 U.S.C. § 558(c), and dismissed the old Sub-No. 2314 application.

and for cancellation of the corresponding temporary authority designated as MC-66562 (Sub-No. 2308TA).

The complaints generally allege that operations of REA Express, Inc., REXCO Division, were in violation of REA's certificated authority, and that Petitioner, REA, was therefore acting outside the scope of its operating authority in violation of 49 U.S.C. §§ 303(c) and 306(a). American Trucking Associations, Inc. urged in its petition that the pending application in MC-66562 (Sub-No. 2345, Part No. 181) should be dismissed for want of prosecution, and that MC-66562 (Sub-No. 2308TA) should be cancelled for lack of a corresponding permanent application.

Oral hearing was held before an Administrative Law Judge on August 30-31, September 1-3, September 7-10, September 13-17, and September 20-22, 1976, in Washington, D.C. Appearances were entered by the original complainants, American Trucking Associations, Inc. as complainant and petitioner, various intervenors, by the Trustee for REA Express, Inc., and by Alltrans Express U.S.A., Inc., as Intervenor in Opposition to the Relief Requested.

By Report and Order, served November 19, 1976, the Commission (Commissioner O'Neal concurring; Commissioner Corber not participating) found that REA Express, Inc., Bankrupt, through C. Orvis Sowerwine, Trustee in Bankruptcy, had been engaged in unlawful operations, and that an order should be entered requiring defendant to cease and desist from all such operations. The Commission further found that REA Express, Inc. had failed to prosecute the application in MC-66562 (Sub-No. 2345, Part No. 181)

in a timely manner; that REA was not shown to be capable of prosecuting the application; that attempted prosecution of the application would not appear likely to result in a feasible operation consistent with the public interest and the National Transportation Policy or required by the public convenience and necessity; and that an order should be entered dismissing the application. Lastly, the Commission found that the corresponding temporary authority should be revoked.

The Trustee and Intervenor Alltrans filed for a stay of the November 17, 1976 order, pending concurrently filed petitions for reconsideration, which stay motion was denied by the Commission's order served December 17, 1976. A Petition for Review was filed with this Court on the same day. By order served January 28, 1977, the Commission denied the petitions for reconsideration and affirmed its November 17, 1976 order.

POSITION OF INTERVENOR ALLTRANS EXPRESS U.S.A., INC.

The Trustee, Petitioner here, will set forth a more complete statement of proceedings and additional facts. It is the primary purpose of Intervenor in this brief to set forth relevant portions of the record and of the law directly related to the Commission's action in dismissing the application referred to above as MC-66562 (Sub-No. 2345, Part No. 181) and revoking temporary authority in MC-66562 (Sub-No. 2308TA). While Intervenor supports and adopts the arguments of the Trustee, it will not burden the record here by a reiteration of all such arguments.

STATEMENT OF FACTS RELEVANT TO ISSUES PRESENTED BY INTERVENOR

As plainly shown by the Commission's orders under review here, there is currently a directly related proceeding before the Commission in Docket Nos. MC-F-13003 and MC-99388 (Sub-No. 11), by which Intervenor seeks to operate the certificates and temporary authorities of REA Express, Inc. By an agreement dated July 27, 1976, and approved by the Bankruptcy Court for the Southern District by order dated July 27, 1976, Intervenor contracted with the Trustee to do so. On September 27, 1976, Intervenor filed with the Commission applications pursuant to 49 U.S.C. §§ 5 and 310a(b) to operate such certificates, as well as an application to substitute as operator-applicant of the temporary authorities and corresponding applications for permanent authorities. Upon termination of pending applications, Intervenor will purchase all permanent authorities then outstanding from the Trustee.

The principal key authority of the Trustee, and the core of the entire 55,000 mile motor carrier route structure of REA Express, Inc. since 1968, is the authority embraced in No. MC-66562 (Sub-No. 2308TA). By order of the Commission dated August 22, 1968, that authority was, in accordance with § 9(b) of the Administrative Procedure Act [5 U.S.C. § 558(c)] and 49 C.F.R. § 1101.1(a), ordered extended until final determination of the corresponding application for permanent authority in No. MC-66562 (Sub-No. 2314), now Sub-No. 2345, Part 181. By order served January 9, 1975, the Sub-No. 2308TA authority was again extended until final determination of Sub-No. 2345, Part 181. In its petition in MC-66562 (Sub-Nos. 2308TA and

and 2314), American Trucking Associations, Inc. requested dismissal of the application in Sub-No. 2314 (which had been dismissed many months earlier by the order of January 9, 1975), for want of prosecution, and cancellation of the authority in Sub-No. 2308TA on the ground of ATA's requested dismissal of Sub-No. 2314.

The original permanent authority application (the "Hub" application) referred to above was filed on May 29, 1968. Its corresponding temporary authority was granted by order dated June 3, 1968. The permanent authority application was assigned for a prehearing conference by the Commission's order served December 10, 1969. The prehearing conference was held on January 12, 1970 before a Hearing Examiner and the Chief Hearing Examiner of the Commission. At the prehearing conference, counsel for REA suggested that applicant was prepared to go forward with its case on March 31, 1970 (Prehearing Conference, Tr. 48). The Chief Hearing Examiner suggested that March 30 did not allow appropriate time in which to prepare and counsel for applicant concurred (Prehearing Conference, Tr. 50). The Chief Hearing Examiner then stated:

> "With that understanding, we will set the operating testimony hearing shortly after the first of May. And then we will move forward quickly after that." (Prehearing Conference, Tr. 77)

There was no prehearing conference report or order. Subsequent to the prehearing conference, several orders were entered all allowing intervention of certain parties, culminating with the intervention of the Atomic Energy Commission on May 7, 1970. The Commission docket shows that, for over 4-1/2 years after the May 7, 1970 order, no order was served in

this proceeding. The next Commission order was that consolidating numerous REA applications, including the original Sub-No. 2314 into Sub-No. 2345. The consolidation order was served on January 9, 1975. Other than the April 8, 1976 order relating to discovery, no other order appears in the public docket concerning the application.

It is noted that, on August 23, 1974, the Deputy Director of the Section of Operating Rights responded to a request for information by counsel, other than for applicant, as follows:

> "This replies to your letter of July 29, 1974, concerning the status of the application of REA Express, Inc., in No. MC-66562 (Sub-No. 2314), REA's so-called 'Hub' application.
>
> A pre-hearing conference was held in this matter on January 1 [12], 1970. No date has been set for formal hearing in this proceeding. As you are no doubt aware, this application envisions a nationwide system of routes comprised of a multitude of both REA's presently held authorities as well as newly applied for operating rights. The problems thus raised by a proceeding such as this are as massive as the application itself.
>
> I regret that I am unable to suggest the processing time for this proceeding in the light of its unusual nature."

Therefore, until the Commission's orders, complained of here, no action had been taken by the Commission with respect to the permanent authority application at anytime except as referred to above.

THE DECISIONS BELOW

On November 19, 1976, the Commission served its report and order, dismissed REA's permanent application in the so-called "Hub-System" proceeding, and revoked its corresponding temporary authority. The dismissal was based on the fact that the application had been on the Commission's docket

for 8 years, that no action had been requested by applicant since the pre-hearing conference of January 12, 1970, and that Rule 247(f) of the Commission's Special Rules of Practice requires that an applicant who does not intend to prosecute its application shall promptly request dismissal thereof. The Commission's position is that applicant had an affirmative duty to prosecute or seek dismissal. The Commission also found that REA had repudiated the "Hub-System" approach in 1971 (although it continued to operate under the System), and, being a bankrupt and liquidated carrier, it could not prosecute its pending applications. The revocation was based on the fact that continuation of temporary authority is conditioned on pendency of a corresponding permanent authority application (49 C.F.R. § 1101). The Commission further held that, regardless of the dismissal, it can revoke an outstanding temporary authority at any time as long as its decision is not arbitrary, capricious, outside the Commission's discretion, or otherwise not in accordance with established principles, citing 49 C.F.R. § 1101.4.

The order served January 28, 1977, affirmed the prior order and added that the notice and compliance provisions of 5 U.S.C. § 558 do not apply to revocation of temporary authority citing Great Lakes Airlines, Inc. v. Civil Aeronautics Board, 111 U.S. App. D.C. 21, 294 F.Supp. 217, cert. den. 366 U.S. 965 (1961).

STATUTES INVOLVED

49 U.S.C., preceding §§ 1, 301, 901, and 1001

> It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of

all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions; — all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

49 U.S.C. § 5(2)(i)

(2)(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) —

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise.

49 U.S.C. § 17(3)

(3) The Commission shall conduct its proceedings under any provision of law in such manner as will best conduce to the proper dispatch of business and to the ends of justice . * * *

49 U.S.C. § 310a(a) and 49 U.S.C. § 310a(b)

(a) To enable the provision of service for which there is an immediate and urgent need to a point or points or within a territory having no carrier service capable of meeting such need, the Commission may, in its discretion and without hearings or other proceedings, grant temporary authority for such service by a commom carrier or a contract carrier by motor vehicle, as the case may be. Such temporary authority, unless suspended or revoked for good cause, shall be valid for such time as the Commission shall specify, but for not more than an aggregate of one hundred and eighty days, and shall create no presumption that corresponding permanent authority will be granted thereafter.

(b) Pending the determination of an application filed with the Commission for approval of a consolidation or merger of the properties of two or more motor carriers, or of a purchase, lease, or contract to operate the properties of one or more motor carriers, the Commission may, in its discretion, and without hearings or other proceedings, grant temporary approval, for a period not exceeding one hundred and eighty days, of the operation of the motor carrier properties sought to be acquired by the person proposing in such pending application to acquire such properties, if it shall appear that failure to grant such temporary approval may result in destruction of or injury to such motor carrier properties sought to be acquired, or to interfere substantially with their future usefulness in the performance of adequate and continuous service to the public.

5 U.S.C. § 558(c) [9(b)]

When application is made for a license required by law, the agency, with due regard for the rights and privileges of all the interested parties or adversely affected persons and within a reasonable time, shall set and complete proceedings acquired to be conducted in accordance with Sections 556 and 557 of this title or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given—

(1) Notice by the agency in writing of the facts or conduct which may warrant the action; and

(2) Opportunity to demonstrate or achieve compliance with all lawful requirements.

When the licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency.

5 U.S.C. § 706

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

ARGUMENT

The Court will note that the Commission expressly recognizes that Intervenor Alltrans had pending before it applications in Nos. MC-F-13003 and MC-99388 (Sub-No. 11) for temporary authority under Section 210a(b)

of the Act [49 U.S.C. § 310a(b)] to operate the Hub temporary authority and to substitute as applicant in the Hub permanent application. In fact, the applications to do so were filed almost two months prior to the Commission's first Report under review here. Intervenor's argument below, as here, is that if the Alltrans' application had been processed as orderly administrative process required [5 U.S.C. § 558; 49 U.S.C. § 310a(b)], the matters now before this Court would be rendered moot. The Commission knew it had a good faith proposal before it to moot these issues, and knew that Intervenor would not operate REA in a manner which was found unlawful in the case before this Court. Yet, the Commission, under the language of 49 U.S.C. § 17(3), refused to follow orderly procedure, in order to destroy the very authorities essential to maintenance of express service utilized by the public up to 1976. This destruction was unwarranted and unnecessary as shown below.

THE DISMISSAL ISSUE

The dismissal of the Hub permanent application is grounded on an alleged failure to prosecute. The courts have firmly established the requirement that "the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained"; otherwise the agency's action must fall as "arbitrary, capricious, and an abuse of discretion". Securities And Exchange Commission v. Chenery Corp., 318 U.S. 80, 90 (1943); 5 U.S.C. § 706; see also: Automatic Canteen Company v. F.T.C., 346 U.S. 61, 81 (1953); Phelps Dodge Corporation v. Labor Board, 313 U.S. 117, 187 (1941); Burlington Truck Lines v. United States, 371 U.S. 156, 167-168 (1962); United

States v. Chicago, M., St. P. & P. R. Co., 294 U.S. 499, 510-511 (1935). This rule is not only a necessary incident of judicial review, it is specifically prescribed by the Administrative Procedure Act, Section 557, which applies in full to the Interstate Commerce Commission. Minneapolis & St. L. R. Co. v. United States, 361 U.S. 173, 193-194 (1959), requires the Commission to include in its decisions "a statement of . . . findings and conclusions as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record . . ." Stated another way, Congress did not purport to transfer its legislative power to the unbounded discretion of the regulatory agency, and the courts have been alert to see that administrative agencies do not overstep their authority. F.C.C. v. RCA Communications, Inc., 346 U.S. 86, 90 (1953).

Here, there is not even a rational connection between the facts of record and the findings made. See Northeast Airlines, Inc. v. Civil Aeronautics Board, 331 F. 2d 479 (1st Cir. 1964). As noted in the facts above, REA appeared at a prehearing conference and indicated it was ready to proceed with the Hub permanent application. No prehearing report was issued nor was the promised hearing order issued. Four and one-half years later, the Commission states flatly, through one of its Deputy Directors, that the application is so unusual and complicated, not even the Commission itself could suggest a processing time. The Commission chooses to ignore these basic facts of record. Rather, it now decided that the applicant REA has a duty to take some affirmative action pursuant to its Rule 247(f), [2/] (as if REA

2/ Intervenor does not disagree with the language of 247(f) [49 C.F.R. 1100. 247(f)], merely its misapplication in the case below.

itself could assign the application for hearing) and that, in any event, REA had repudiated the Hub concept in REA Express, Inc., Application For Emergency Temporary Approval, 117 M. C. C. 80 (1971).

First, to constitute "failure to prosecute" requires proof of failure to comply with an order or to discharge some legal obligation with respect to the application. Fed. R. Civ. P. 41(b); Navarra v. Chief of Police, Des Moines, Iowa, 523 F. 2d 214 (8th Cir. 1975); Compare Traffic Motor Express Common Carrier Application, 1 M. C. C. 419 (1937) and Wellington Wells Watkins Contract Carrier Application, 2 M. C. C. 309 (1937), (where applicants failed to respond to hearing orders). There is not one word of evidence in this record of any failure of REA, the Debtor-In-Possession, or the Trustee to comply with any order in the Hub permanent authority proceedings. The record does show that REA offered to go forward, and the Chief Hearing Examiner of the Commission stated "we will set the operating testimony hearing shortly after the first of May [1970]" (Transcript of Prehearing Conference, p. 77). The Commission did not issue such an order, no protestant requested a hearing, and in August, 1974, the Commission indicated that it was unsure how to process the application. In January, 1976, the Commission did recognize the viability of the application by consolidating it with 192 other pending REA applications (it became MC-66562 (Sub-No. 2345, Part 181)). Neither Part 181 nor any other part of the Sub-No. 2345 proceeding has ever been assigned for hearing.

Therefore, where is there a failure to comply with an order or discharge any obligation? Consistent with Rule 247(f), Intervenor did not intend

prosecute the application, and so informed the Commission two months prior to the first report in the case under review before this Court. It is respectfully submitted that there is no rational connection between the facts of record and the finding made. The Commission's Rule 247(f) argument is, at best, a poor vehicle to accomplish the Commission's unstated purpose to destroy express service.

The repudiation argument of the Commission requires brief comment. This theory for dismissal evolved from a statement of REA, reported in REA, Application For ETA, supra, that if its application to convert from a regular to an irregular-route operation were granted, it would relinquish all of its regular-route authority. The simple fact is that the application was denied. The Commission held that "express service, whatever else it may be, must be performed as an expedited regular-route service". (117 M. C. C. at 88-89) 3/ Following the denial, the operation continued to be conducted under the authority in question here. For the next 4 years no one made any claim, nor could they, that REA had abandoned any of its existing authorities or applications.

Certainly, Intervenor does not "repudiate" the concept. Again, the Commission knew before its first report that, not only the Intervenor did not repudiate the concept embraced in the authorities, but place a high value on it. As stated to this Court on the Motion To Stay, Intervenor placed a value of up to $9.6 million on this "repudiated" concept.

On October 15, 1976, it became evident that such imperfect vehicles, as described above, would be utilized to one end — to frustrate the attempt of

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3/ Certainly, the mere filing of an application could not constitute legal abandonment of REA's entire operation.

Intervenor Alltrans to immediately resume the service and undertake to prosecute the applications. On that day the Commission, by a 5 to 4 decision, issued a "Notice To Interested Parties", refused to act on the Alltrans' proposal until final determination of the proceedings now before this Court. 4/ Thus, it is clear that it has been the Commission, not the applicants before it, which has prevented prosecution of the Hub permanent application. The applicant cannot, therefore, be charged with the failure.

Section 17(3) does give to the Commission discretion to conduct its proceedings, according to law, for the proper dispatch of business and to the ends of justice. But that discretion is not unbridled. As the cases cited at the outset of this argument hold, the agency's discretion can be abused and it is within this Court's power under 5 U.S.C. § 706 to correct that abuse. We submit that the dismissal finding is arbitrary and capricious, and is an abuse of discretion.

THE REVOCATION ISSUE

The cancellation finding is supported by the lack of a corresponding permanent authority application, the dismissal discussed above. In revoking the temporary authority, it is the position of the Commission that the holder of the authority was not entitled to the notice and compliance provisions of § 9(b) of the Administrative Procedure Act [5 U.S.C. § 558(c)]. Summary revocation is lawful, it is said, because (1) the § 9(b) provisions do not apply to temporary authority, citing Great Lakes Airlines, Inv. v. Civil Aeronautics

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4/ The Alltrans proposal was not even docketed for three weeks -- normally a routine, immediate function.

Board, 111 U.S. App. D.C. 21, 294 F.Supp. 217, cert. den. 366 U.S. 965 (1961), and (2) the provisions do not apply in cases of willfulness.

The ruling that 5 U.S.C. § 558(c), § 9(b) of the Administrative Procedure Act does not apply to temporary authorities is plainly erroneous. The United States Supreme Court has long held that § 9(b) must be read in conjunction with the temporary authority provisions in the Interstate Commerce Act. In Pan Atlantic Steamship Corporation v. Atlantic Coast Line Railroad Co., 353 U.S. 436 (1957), the Court specifically held, in a water carrier case, that:

> "licensee as used in the sense of § 9(b) which we have quoted, would seem therefore, to include one who holds a temporary permit under § 311(a)." (353 U.S. at 439)

The Court went on to state that the Commission has fully authority to extend any temporary authority beyond 180 days. In his dissent going only to the 180 day holding (a position consistently rejected), Justice Burton agreed that § 9(b) applied while constantly referring to the situation in § 311(a) of the Act as being synonymous with the situation existing under § 210a(b) of the Act, which provision is involved here. It is, therefore, clear that § 9(b) of the Administrative Procedure Act does have relevance and is effective as to temporary authorities issued by the Commission.

The Great Lakes case is inapplicable. The Court in Great Lakes assumed, for the purpose of argument, that the petitioners there did have "licenses", but they were temporary or conditional. Nevertheless, the Court merely held that the difference was not one of substance, because the license or authority under consideration was not withdrawn, suspended,

revoked or annuled within the meaning of § 9(b) of the Administrative Procedure Act. They expired or were terminated by their own terms. Such is not the case here. In Great Lakes the order under attack was an original licensing proceeding and petitioners did not have their license revoked as punishment for past conduct, but were found unqualified for permanent licenses, as a result of a board proceeding, and their temporary licenses thereupon expired by their own terms. In no way, can it be found that the situation is the same in the instant case. Here, the authority did not expire by its own terms, but was revoked. It is thereby protected by the Administrative Procedure Act.

To place the Great Lakes case in perspective, the Court's attention is respectfully invited to County Of Sullivan v. Civil Aeronautics Board, 436 F. 2d 1096 (2nd Cir. 1971), in which a local airport sought to force an airline to request extension of its temporary authority past the date providing for expiration thereof in the original grant. The airline refused, and the county in which the airport was located applied to this Circuit. In a discussion of the Pan Atlantic case, supra, the Court stated that "the whole thrust of § 9(b) is to protect applicants and licensees, not to impose unsought obligations upon them (436 F. 2d at 1099). In quoting Mr. Justice Burton's dissent in Pan Atlantic, the Court of Appeals referred to a passage which with the majority did not express disagreement.

> "The policy behind the third sentence of § 9(b) is that of protecting those persons who already have regularly issued licenses from the serious hardships occasioned both to them and to the public by expiration of its licenses before the agency finds time to pass upon its renewal."

In quoting Mr. Justice Burton, the Court of Appeals also referred to Attorney General's Manual on the Administrative Procedure Act 91-92 (1947), also referred to in the Great Lakes case. It is respectfully submitted that the Court in Great Lakes, did not, and would not, state that due process can be eliminated merely because a temporary license is involved. That issue was not before the Court of Appeals in Great Lakes. Section 9(b) does apply to temporary authorities as the Supreme Court has so clearly held. When the Court in County Of Sullivan stated that the temporary authority could expire by its own terms, it in no sense was holding that summary revocation was ever in order. Similarly, the Great Lakes court held only that such temporary authority could expire by its own terms, particularly where the original licensing proceeding had been held and the application disapproved.

No proceedings have been held here with respect to the corresponding permanent application, and the Commission's validly issued order continuing the effect of Sub-No. 2308TA should remain viable by force of law. The Commission's attempts to evade appropriate procedure, thus denying due process, must fail.

As to willfulness, the following is submitted. The finding that a Trustee In Bankruptcy appointed by, and operating under month-to-month authorizations of the Bankruptcy Court, was engaged in willful violation of the Federal Statute is not only erroneous, it is entirely gratuitous in that the issue was never raised in the complaints initiating the proceeding before this Court. Secondly, while the agency is not bound by stare decisis there are boundaries.

Also, while courts cannot be concerned with the consistently or inconsistency of the conclusions and findings of the Commission, consistency of administrative rulings is essential, for to adopt different standards for similar situations is to act arbitrarily. The law does not permit an agency to grant to one person the right to do that which it denies to another similarly situated. HC&D Moving & Storage Company v. United States, 298 F. Supp. 746 (Hawaii 1969). There may not be a rule for Monday, another for Tuesday, a rule for general application, but denied outright in a specific case. Mary Carter Paint Co. v. F. T. C., 333 F. 2d 654 (5th Cir. 1964), rev'd on other grounds, 382 U. S. 46 (1965).

Historically, the Commission, in determining fitness, is required to consider the nature and extent of the violations, the mitigating circumstances, if any, whether applicant's conduct represents a flagrant or persistent disregard of the provisions of the Act, whether applicant has made a sincere effort to correct its past mistakes, or whether applicant has demonstrated its willingness and ability to comport in the future with the applicable rules and regulations of this Commission. See, Midwest Emery Freight System, Inc. - Investigation And Revocation Of Certificates, 124 M. C. C. 105 (1975); Melton Truck Lines, Inc., Extension - Materials Used In Installation Of Roofing, 88 M. C. C. 723 (1962); L & M Express Company, Extension - Crewe, Va., 106 M. C. C. 334 (1968); Johnny Brown's Inc., Extension - Winchester, Va., 111 M. C. C. 905 (1970). Normally, unfitness is found from a record of past conduct demonstrating a pattern of serious or continuing unlawfulness. See, Sammons Trucking Extension - Aberdeen, S. Dak., 124

M. C. C. 373 (1976); and willful violations are those resulting from continuous, intentional disregard or indifference to the requirements of law, and a history of violations after repeated warnings. Midwest Emery Freight System, Inc. - Control and Merger - Interstate Truck Service, Inc., 101 M. C. C. 19 (1965). This is particularly true in the case of repeated violations which include failure to comply with a prior cease-and-desist order. Georgia-Florida-Alabama Transportation Co. And Bay Transportation, Inc. - Investigation And Revocation Of Certificates, 125 M. C. C. 41 (1976).

Where there has been no subterfuge, prior history of violations, nor disregard of Commission orders, and in the absence of a deliberate and willful intent to violate the law, the Commission has consistently refused to find carriers' unlawful operations as willful and has in fact found the carriers fit. See, Gregory Heavy Haulers, Inc., Extension - Highway Construction Equipment From Illinois, 74 M. C. C. 623 (1958); Colonial Motor Freight Line - Control - Griggs Trucking Co., 116 M. C. C. 551 (1974); Carolina Cartage Co., Inc., Extension - Atlanta And Charlotte Airports, 125 M. C. C. 49 (1976); Eagle Motor Lines, Inc., Extension - Lincoln, Alabama, 107 M. C. C. 499 (1968); Vancouver Airline Limousines, Ltd., Extension - Charter Operations, 71 M. C. C. 101 (1957); Charles D. Woody Common Carrier Application, 73 M. C. C. 1 (1957); Paul R. McLaughlin Common Carrier Application, 73 M. C. C. 318 (1957); The Bridgeport United Delivery Company Common Carrier Application, 73 M. C. C. 491 (1957); Guy Rushing Common Carrier Application, 83 M. C. C. 430 (1961); Roadway Express, Inc., Extension - Birmingham, Dallas, Houston, 82 M. C. C. 689 (1960);

Leamington Transport (Western) Limited Common Carrier Application, 81 M. C. C. 695 (1959); Aalco Express Co., Inc., Extension - Uncrated Refrigeration Cases, 78 M. C. C. 567 (1958); J & M Enterprises, Inc., Common Carrier Application, 76 M. C. C. 226 (1958); Vernon C. Kiser Common Carrier Application, 89 M. C. C. 750 (1962).

Therefore, the Commission has consistently recognized that parties are at least entitled to notice and compliance prior to a finding of willfulness. That is, of course, except in the case under review here where no notice of misconduct was given. It is respectfully submitted that the finding of the Commission is inconsistent with the principles of Mary Carter Paint and HC&D, supra.

We urge that § 9(b) is intended to protect licensees from revocation for excusable misconduct. Notice provides the means by which an agency informs the licensee and provides him with an opportunity to comply and a chance to demonstrate good faith. This must be found to be the intention of § 9(b). An earlier draft of § 9(b) used the term "clearly demonstrated willfulness". (H. R. 339, 79th Cong. 1st Sess. § 8(b) (1945), reprinted in S. Doc. 144). The Chairman of the House Subcommittee that reported the bill, which eventually passed, told the House that the exception applied only "in cases of obvious willfulness" (92 Cong. Rec. 5654 (1946), remarks of Representative Walter, reprinted in S. Doc. 368). The Senate Judiciary Committee thought that willfulness must be "manifest" and that the exception should be applied only where the "demonstrable facts fully and fairly warrant". (S. Rep. No. 752, 79th Cong. 1st Sess. (1945), reprinted in S. Doc.

211, H. R. Rep. No. 1980, 79th Cong. 2d Sess. 41 (1946)). The Supreme Court has interpreted willfulness as meaning purposely or obstinately designed to describe the attitude of a carrier, who, having a free choice or will, either intentionally disregards the statute or is plainly indifferent to its requirements. United States v. Illinois Central Railroad Co., 303 U.S. 239 (1938).

When the above is read in conjunction with the Trustee's Brief, it cannot be said that the Trustee acted willfully or in careless disregard of the statute or its requirements. The Commission must concede that this case involves a summary dismissal. Such action clearly violates § 9(b) of the Administrative Procedure Act — which does apply — and warrants reversal.

CONCLUSION

Intervenor Alltrans presented to the Respondent Commission a proposal to moot every issue in the case under review. The Commission chose to forego even a consideration of that proposal under the provisions of § 210a(b) of the Act until it could destroy the very basis of the property sought to be acquired. It did so by the dismissal on highly irregular grounds, and the cancellation which occurred in a procedure inconsistent with due process of law and in contravention of the governing statute. The entire procedure was engaged in to reach a predetermined result without resort to the appropriate procedure offered by Intervenor.

In sum, Intervenor contends that it has demonstrated that the action of the Commission here under review was arbitrary, lacking in rational

basis, and reflects the Commission's decision to dismiss an application and cancel existing authority, irrespective of evidence, credibility, fact, or reason.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REA EXPRESS, INC., BANKRUPT, C. ORVIS SOWERWINE, TRUSTEE IN BANKRUPTCY, Petitioners, et al.,	)	
v.	)	Civil Action No. 76-4278
UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Respondents, et al.	)	

CERTIFICATE OF SERVICE

I, J. WILLIAM CAIN, JR., hereby certify that I have this 25th day of February, 1977, served the foregoing Brief of Intervenor Alltrans Express U.S.A., Inc., In Support Of Petitioner, upon all parties of interest with respect to this matter, by mailing a copy thereof, properly addressed, with First Class postage, prepaid, to each of the following:

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